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No. 88-2031

In The

Supreme Court of the United States

October Term, 1989

THE UNITED STATES OF AMERICA,

Petitioner,

v.

MARSHA B. KOKINDA AND KEVIN E. PEARL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF AMICUS CURIAE OF THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA, INC. IN SUPPORT OF RESPONDENTS

DAVID M. LIBERMAN
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 277-9288

Attorney for Amicus Curiae International Society for Krishna Consciousness of California, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the exterior, public access sidewalks adjacent to a community post office which are open to the general public at all times without restriction are a public forum?

2. Whether the solicitation of contributions for a political cause is a protected form of First Amendment expression which may not be totally banned from public access postal sidewalks?

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BRIEF AMICUS CURIAE OF THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA, INC. IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS

This brief *amicus curiae* is submitted in support of the Respondents by the International Society for Krishna Consciousness of California, Inc. (ISKCON), a not-for-profit religious corporation in Los Angeles, California. The brief is filed with the consent of the parties, as provided for by the Rules of Court. Letters confirming

the consent of the parties have been or will be filed with the clerk.

Members of ISKCON adhere to the principles of *Gaudiya Vaishnavism*, or Krishna Consciousness, which as a central tenet of its theology and beliefs requires its followers to regularly venture into public places for the purposes of distributing religious literature, soliciting funds to support the religion, and encouraging members of the public to participate in various Krishna Consciousness activities. Known in the sanskrit language as *sankirtan*, this activity "has three purposes: (1) to spread religious information the Hare Krishna religion deems to be the truth; (2) to proselytize and attract new members; and (3) to generate funds to support the religious activities of the movement." *United States v. Silberman*, 464 F. Supp. 866, 870 (M.D. Fla. 1979).

Because the performance of *sankirtan* "lies at the theological heart of [ISKCON's] religion" *Int'l Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430, 443 (2d Cir. 1981), Krishna followers throughout the United States have consistently sought access to public places where the largest numbers of people can be found. These places have included "quintessential" public fora such as streets and parks,[1] as well as equally appropriate public fora

[1] *Int'l Soc'y for Krishna Consciousness v. Schmidt*, 523 F. Supp. 1303 (D.My. 1981); *Int'l Soc'y for Krishna Consciousness v. Kearnes*, 454 F. Supp. 116 (E.D. Cal. 1978); *Int'l Soc'y For Krishna Consciousness v. City of New York*, 484 F. Supp. 966 (S.D.N.Y. 1979); *Int'l Soc'y for Krishna Consciousness v. Conlisk*, 374 F. Supp. 1010 (N.D. Ill. 1973); *Int'l Soc'y for Krishna Consciousness v. City of New Orleans*, 347 F. Supp. 945 (E.D. La. 1972).

such as airports,[2] state fairs,[3] public buildings,[4] stadia,[5] and highway rest areas,[6]

[2] *E.g., Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Int'l Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir. 1979); *Int'l Soc'y for Krishna Consciousness v. Rochford*, 585 F.2d 263 (7th Cir. 1978); *Int'l Soc'y for Krishna Consciousness v. Lentini*, 461 F. Supp. 49 (E.D. Lou. 1978); *Int'l Soc'y for Krishna Consciousness v. Lee*, 721 F. Supp. 572 (S.D.N.Y. 1989); *Int'l Soc'y for Krishna Consciousness v. New York Port Authority*, 425 F. Supp. 681 (S.D. N.Y. 1977); *Int'l Soc'y for Krishna Consciousness v. Wolke*, 453 F. Supp. 869 (E.D. Wis. 1978); *Int'l Soc'y for Krishna Consciousness v. Griffin*, 437 F. Supp. 666 (W.D. Pa. 1978); *Int'l Soc'y for Krishna Consciousness v. Engelhardt*, 425 F. Supp. 176 (W.D. Mo. 1977); *Int'l Soc'y for Krishna Consciousness v. Collins*, 452 F. Supp. 1008 (S.D. Tex. 1977).

[3] *E.g., Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981); *Hynes v. Metro Gov't of Nashville and Davidson County*, 667 F.2d 549 (4th Cir. 1982); *Int'l Soc'y for Krishna Consciousness v. Barber*, 650 F.2d 430 (2d Cir. 1981); *Edwards v. Maryland State Fair and Agricultural Soc'y, Inc.*, 628 F.2d 282 (4th Cir. 1980); *Int'l Soc'y for Krishna Consciousness v. Bowen*, 600 F.2d 667 (7th Cir.), *cert. denied*, 444 U.S. 963 (1979); *Int'l Soc'y for Krishna Consciousness v. State Fair of Texas*, 480 F. Supp. 67 (N.D. Tex. 1979); *Int'l Soc'y for Krishna Consciousness v. Evans*, 440 F. Supp. 414 (S.D. Ohio 1977).

[4] *E.g., Jaffe v. Alexis*, 659 F.2d 1018 (9th Cir. 1981); *United States v. Silberman*, 464 F. Supp. 866 (M.D. Fla. 1979); *United States v. Boeswetter*, 463 F. Supp. 370 (D.C.D.C. 1978); *Int'l Soc'y for Krishna Consciousness v. McAvey*, 450 F. Supp. 1265 (S.D.N.Y. 1978); *Int'l Soc'y for Krishna Consciousness v. Schrader*, 461 F. Supp. 714 (N.D. Tex. 1978).

[5] *E.g., Carreras v. City of Anaheim*, 768 F.2d 1039 (9th Cir. 1985); *Int'l Soc'y for Krishna Consciousness v. New Jersey Sports and Exposition Auth.*, 691 F.2d 155 (3d Cir. 1982).

[6] *Int'l Soc'y for Krishna Consciousness v. Hays*, 438 F. Supp. 1077 (S.D. Fla. 1977).

In seeking access to these forums, ISKCON's overriding purpose has been to reach as many people as possible. *See* A. Bhaktivedanta, *Sri Caitanya Caritamrta: The Pastimes of Lord Caitanyva Mahaprabhu*, 3 Madhya-Lila, 7:128 (1975) ("Instruct everyone to follow the orders of Lord Krishna as they are given in the *Bhagavad-gita* and *Srimad Bhagavatam* . . . and in this way *try to liberate everyone in this land.*" [emphasis added]).

For this reason, *amicus* is concerned about the government's contention that the exterior, public access sidewalks of community post offices – places which are frequented by millions of people each year – are nonpublic forums. Such grassroots facilities are essential to the "poorly financed causes of little people" *Martin v. Struthers*, 319 U.S. 141, 146 (1943), who lack the resources necessary to obtain access to the more powerful forms of communication such as radio, television, magazines, and newspapers. If the government's position is thus adopted, then the dissemination of views of those outside the boundaries of mainstream opinion will be severely limited.

SUMMARY OF ARGUMENT

This Court has often stated that speech on issues of public concern occupies the "highest rung of the hierarchy of First Amendment values" and merits "special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983). Such speech is the "essence of self-government" *Garrison*

v. Louisiana, 379 U.S. 64, 75 (1964), which "can be successful only when it rests upon the strongest possible commitment to the positive right and the narrowest basis for exceptions." T. Emerson, *Toward a General Theory of the First Amendment* 19 (1966). Public forum analysis, therefore, must proceed from the premise that "debate on public issues should be uninhibited, robust, and wide-open" *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), and that there must exist widespread opportunity for persons and groups to disseminate their message to their fellow citizens.

The extent to which the government must permit access by the public for expressive activity to a publicly owned facility thus depends upon the nature of the place. Streets, parks, sidewalks, and other public thoroughfares lie at one end of the spectrum. In these places, the government's power to limit expression is sharply circumscribed, *United States v. Grace*, 461 U.S. 171, 177 (1983), but even there, the scope of permissible restriction varies with the particularities of site and environment. At the opposite end are prison grounds, *Adderley v. Florida*, 385 U.S. 39 (1966), which are closed to the public to ensure security, and military bases, *Greer v. Spock*, 424 U.S. 828 (1976), which by tradition and necessity are enclaves set apart from quotidian civilian pursuits, as well as special-purpose instrumentalities not open to the public, like letterboxes. *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981). Somewhere in between are limited public events like state fairs, *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981), from which expression may not be excluded, but in which it may be rather more closely regulated than in streets

and parks. What is reasonable in a given case is a function of the characteristics of the facility in question.

The exterior, public access postal sidewalks at issue in this case are a public forum. They are close indeed in nature and function to the streets, sidewalks, and parks that have been termed "quintessential" public fora. Their characteristics bear little relevant resemblance to those of military bases, mailboxes, or jailhouse grounds. Thus, in *Frisby v. Schultz*, 108 S.Ct. 2495 (1988), the Court emphasized that even residential streets and sidewalks, which have no history of or dedication to expressive use, are nonetheless paradigm public fora.

There are, no doubt, areas of a postal sidewalk where the government has a special interest in limiting or prohibiting access for expression, and, depending upon the physical features and use of a particular sidewalk, regulations – perhaps more rigorous than would be permissible on a city sidewalk – of time, place, and manner would be appropriate. It does not follow, however, that access may be excluded entirely. Common sense suggests that although on a postal sidewalk one could be prevented from – as one might do on a sidewalk – promoting a political candidate with a loudspeaker, or from – as one might do in a park – performing a political skit, there are many expressive activities that are perfectly appropriate. The solicitation of contributions is a clear example.

The public access sidewalks of the Bowie post office are areas where people may, and do, come and go at will. There are no restrictions on public access, and, in this

respect, they are indistinguishable from any other municipal sidewalk. They are inherently suited to and particularly appropriate for expressive activity, including the solicitation of contributions, which is fully protected by the First Amendment. Justice Roberts' dictum in *Hague v. CIO*, 307 U.S. 496, 515 (1939), referring to "streets and public places," pointedly recognized that the class of fora is open-ended. Exterior, public access sidewalks of community post offices are an entirely proper member of that class.

ARGUMENT

I.

THE EXTERIOR, PUBLIC ACCESS SIDEWALKS IMMEDIATELY ADJACENT TO GOVERNMENT BUILDINGS SUCH AS POST OFFICES ARE A PUBLIC FORUM.

A. Introduction.

The government's proposed public forum analysis, which focuses on government ownership and control of the property to which access is sought, fails to grasp the dynamics of the three-part test enunciated in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), as well as the core First Amendment values underpinning it. Indeed, any explication of public forum analysis must proceed from the premise that freedom of speech "is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). "With rare aberrations, a pervasive recognition of that truth can be traced in our history,

political and legal." *Id.* at 326. The reason for this exalted status is that "access to information enabling conscious choice is vital to our democratic way of life." *Asociacion de Trabajadores Agricolas v. Green Giant Co.*, 518 F.2d 130, 135 (3d Cir. 1975).

Consequently, there must exist widespread opportunity for the exercise of these freedoms. "[T]he welfare of the public" depends not upon the debate of an intellectual elite, but rather upon "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20, (1945). The dissemination even of "poor and puny anonymities," *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting), is deemed as necessary to achieve the "ultimate good" thought to be produced "by free trade in ideas," *id.* at 630, as is the publication of controversial public documents by the most prestigious organ of the conventional press. *E.g., New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) ("Pentagon Papers").

For this diversity of viewpoints to be a reality in our public life, a wide array of publicly owned and operated grassroots fora must remain available:

> For many persons who do not have easy access to television, radio, the major newspapers, and the other forms of mass media, the only way they can express themselves to a broad range of citizens on issues of general public concern is to picket, or handbill, or to utilize other relatively inexpensive means of communication. The only hope that these people have to be able to communicate effectively is to be permitted to speak in those areas in which most of their fellow citizens can be found.

Lloyd Corp. v. Tanner, 407 U.S. 551, 580-81 (1972) (Marshall, J., dissenting).

The right of access to a public forum is also an essential element of the democratic process because it enables the dissident, or controversial person or group, to present their views in the marketplace. Consequently, prohibition of

> free expression in [public areas] affects most frequently those who advocate unpopular causes. It is those who seek to change the status quo who have historically taken to the streets or *other public places* to promote their causes. Those who are satisfied with our society as it is, normally use other forums.

Rosen v. Port of Portland, 641 F.2d 1243, 1251 (9th Cir. 1981) (emphasis added).

Because public places and facilities such as community post offices may be "important facilit[ies] for public discussion," such facilities must constitute "a public forum that the citizen can commandeer," and the basic guarantee of the public forum concept is to ensure this access.[7] Kalven, *The Concept of the Public Forum: Cox v.*

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[7] By offering an "invitation to dispute . . . the public forum right may [also] serve other purposes including the furthering of individual self-fulfillment and providing for an escape valve for closely felt emotions." Horning, *The First Amendment Right to a Public Forum*, 1969 Duke L.J. 932, 939 (comma omitted). From this point of view, the right to a public forum directly

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Louisiana, 1965 Sup. Ct. Rev. 1, 12. Indeed, "the generosity and empathy with which such facilities are made available is an index of freedom." *Id.*

B. The Concept Of The Public Forum Is Diverse And Evolving.

In this century's classical formulation, public fora are those "streets and public places" that must be deemed to be "held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J., joined by Black, J.) Because these places are so impressed with a public trust, their "purpose," in the barest functional sense, cannot limit their use. The essence of the doctrine is that, "although" for example "parks and streets serve the diverse purpose of traffic and recreation," the municipality in whose name they are owned cannot but allow at least some access for public expression. Z. Chafee, *Free Speech in the United States* 418 (1941); *see, e.g., Schneider v. State*, 308 U.S. 147, 160-61 (1939). The concept of the public forum, then, by its nature can be neither monolithic nor static. To the contrary, the realm of public fora is multifarious, and the essence of the idea entails that the array of places that constitute public fora cannot be forever fixed.

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promotes freedom of thought, which has long been recognized to be an end in itself. *See, e.g., Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

The Court has referred to "streets and parks" as "quintessential public forums," *Perry*, 460 U.S. at 45, but, by definition, as well as by years of settled law, that brief list is far from exhaustive of the "streets and public places" to which Justice Roberts referred. Certainly streets, *e.g., Jamison v. Texas*, 318 U.S. 413 (1943), and parks, *e.g., Niemotko v. Maryland*, 340 U.S. 268 (1951), are places from which speech may not be banned, but so are state fairs, *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981), school grounds, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), public libraries, *Brown v. Louisiana*, 383 U.S. 131 (1966), and state capitol grounds. *Edwards v. South Carolina*, 372 U.S. 229 (1963). Indeed, no a priori limit may be set. "[T]he truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular place." *M'Ara v. Lord Provots*, [1913] Sess. Cas. 1059, 1073-74 (Sess.) (Dunedin, L.P.), *quoted in Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (plurality opinion) and *Niemotko*, 340 U.S. at 283 n.1 (Frankfurter, J., concurring in the result).

Even places within whatever may be considered the irreducible core of public fora vary greatly in character; they may accordingly be differentially regulated. "Columbus Circle is . . . a milieu quite different from . . . a New England village green." *Niemotko*, 340 U.S. at 284 (Frankfurter, J., concurring in the result). "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable.' " *Grayned v. City of Rockford*, 408 U.S. 104, 116

(1972) (footnote omitted) (quoting Wright, *The Constitution on Campus*, 22 Vand. L. Rev. 1027, 1042 (1969)). Regulations may well operate to exclude from the residential streets of Scarsdale a demonstration that would be permissible in Times Square, *see Carey v. Brown*, 447 U.S. 455, 470-71 (1980), and no doubt all that must be allowed in Lafayette Park need not be on the White House lawn. Similarly, "streets," although the most quintessential of fora, also present distinctive hazards from traffic, and thus a law regulating expressive activities there may be supported by strong interests that would not exist with respect to a sidewalk or a park.[8] "[I]n the guise of regulation," however, the use of the forum for speech may not "be abridged or denied." *Hague*, 307 U.S. at 516.

The primary category of fora thus consists of places "clearly held in trust, either by tradition *or recent convention*, for the use of the public at large." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.32 (1984) (emphasis added). And, as discussed below, the public forum concept unquestionably embraces the types of exterior postal sidewalks at issue here.

C. The Exterior, Public Access Sidewalks Of The Bowie Post Office Are A Public Forum.

Respondents in this case seek nothing more than to use the exterior sidewalks that surround the Bowie post

[8] *See, e.g., ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986) (ordinance prohibiting solicitation from cars temporarily stopped at intersections).

office as a location for the exercise of their First Amendment rights. These sidewalks are indistinguishable from the perimeter sidewalks that run parallel to the streets which run adjacent to the post office, or the sidewalks that may front any public facility located in a downtown commercial district. They are, therefore, paradigm public fora.

Sidewalks are impressed with "a kind of First Amendment easement" Kalven, *supra*, 1965 Sup. Ct. Rev. at 13, which mandates that "expressive activity may be restricted only for weighty reasons." *Grayned*, 408 U.S. at 115. The issue in this case, therefore, is whether the public access sidewalks adjacent to the Bowie post office are somehow transmogrified when their course leads to or past the structure itself, making them "post office sidewalks" rather than "municipal sidewalks," and thereby making them non public fora. *Amicus* contends that the immemorial rights of free men simply are not subject to destruction by such sleight of hand. Indeed, for purposes of the "First-Amendment easement," such sidewalks are firmly included in the public forum family.

> *Wherever the title of streets and parks may rest*, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the Untied States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in

> subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague, 307 U.S. at 515-16 (emphasis added).

In the decades since *Hague* was decided this Court has repeatedly adopted and endorsed the principle enunciated by Justice Roberts. *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. at 651; *Grayned v. City of Rockford*, 408 U.S. at 104; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969); *Kunz v. New York*, 340 U.S. 290, 293 (1951); *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). Indeed, when considering questions concerning the use of public streets and walkways "for the expression of religious [or political] views," the Court "start[s] with the words of Mr. Justice Roberts." *Grayned*, 408 U.S. at 115 (quoting *Kunz*) (brackets in original).

Streets, sidewalks and parks, therefore, "are considered, *without more*, to be 'public forums.' " *Grace*, 461 U.S. at 177 (emphasis added). Recently, in *Frisby v. Schultz*, 108 S.Ct. 2495 (1988), the Court emphatically declined to engage in the type of public forum hair-splitting that the government now urges it to do. With respect to residential streets and sidewalks, the Court stated:

> In short, our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a 'cliche,' but recognition that '[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.' *Hague v. CIO, supra*, 307 U.S., at 515, 59 S.Ct., at 964 (Roberts, J.). No particularized inquiry into the precise nature of a specific street is necessary;

> all public streets are held in the public trust and are properly considered traditional fora.

Id. at 2500.

This principle is as true of the sidewalks of government buildings as it is of downtown commercial streets and sidewalks, or of residential streets and sidewalks.[9] Thus, in the odd case in which the issue has been presented, the courts have not bothered to distinguish among sidewalks on the basis of where "title is held." Instead, a functional approach has been employed: all exterior sidewalks are presumptively public fora. *See, e.g., Grace*, 461 U.S. at 180 ("sidewalks that serve as the perimeter of the Court grounds"); *Flower v. United States*, 407 U.S. 197, 198 (1972) (per curiam) (public street of military base);[10] *Dallas Ass'n of Community Organizations for Reform Now v. Dallas County Hospital District*, 670 F.2d 629, 632 (5th Cir.) (sidewalks of government hospital), *cert. denied*, 459 U.S. 1052 (1982); *Int'l Soc'y for Krishna Consciousness v. Schrader*, 461 F. Supp. 714, 719 n. 6 (N.D. Tex. 1978) (exterior sidewalks of Dallas Convention Center); *see also Jews for Jesus, Inc. v. Bd. of Airport Comm'rs*, 785 F.2d 791, 795 (9th Cir. 1986), (analogy to city sidewalks relied upon to hold airport terminal a public forum), *aff'd on other grounds*, 107 S.Ct. 2568 (1987); *Jamison v. City of St. Louis*,

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[9] Privately owned sidewalks are, of course, another matter, *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976), unless the sidewalks are those of a "company town" or its equivalent. *Marsh v. Alabama*, 326 U.S. 501, 509 (1946).

[10] *Greer v. Spock*, 424 U.S. 828, 837 (1976), distinguished *Flower* on the ground that the location in question was a secured military enclave and not functionally a public street as the location in *Flower* had been.

828 F.2d 1280, 1283 (8th Cir. 1987) (same), *cert. denied*, 108 S.Ct. 1289 (1988); *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 764 (D.C. Cir. 1983) (same); *Fernandes v. Limmer*, 663 F.2d 619, 627 (5th Cir. 1981) (same), *cert. dismissed*, 458 U.S. 1124 (1982); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir.) (same), *cert. denied*, 421 U.S. 992 (1975); *Wolin v. Port of New York Authority*, 392 F.2d 83, 89 (2d Cir.) (same analogy applied to bus terminal), *cert. denied*, 393 U.S. 940 (1968); *cf. Jaffe v. Alexis*, 659 F.2d 1018 (9th Cir. 1981) (restrictions on use of sidewalks of California Department of Motor Vehicle offices on the basis of content of expression held invalid).[11]

Thus, the external, public access sidewalks adjacent to community post offices "are in appearance and location difficult to distinguish from city sidewalks." *Int'l Soc'y for Krishna Consciousness v. Schrader*, 461 F. Supp. at 719 n.6. In fact, functionally and realistically, these walkways *are* city sidewalks.

For this reason, the sidewalks of the Bowie post office are, "without further inquiry," public fora. *Grace*, 461 U.S. at 179. "Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for

[11] *See also In re Hoffman*, 67 Cal.2d 845, 877, 434 P.2d 353, ___, (1967) finding Union Station to be public forum under California Constitution, and *Carreras v. City of Anaheim*, 768 F.2d 1039, 1045-47 (9th Cir. 1985) finding exterior sidewalks and parking lots of Anaheim Stadium and Anaheim Convention Center to be public forum also under California Constitution.

the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." *Id.*; *see Schrader*, 461 F. Supp. at 719 (exterior sidewalks of Dallas Convention Center held to be public fora even though interior passageways held not to be in most circumstances).

D. The Government's Public Forum Theory Is Unduly Restrictive.

In recognition that exterior, public access postal sidewalks are virtually indistinguishable from any other municipal sidewalk, the government advances a public forum theory which focuses on singular usage as opposed to the physical character and function of the particular place. "It is the *use* to which government property is put or for which it is designated, not its physical characteristics, that determines whether it is a public forum." Brief for the United States at 12, 24 (emphasis in original). This approach misperceives the substance of public forum analysis.

As discussed above, *Perry*, its predecessors, and its progeny do not suggest that only those places which have a long tradition of assembly and debate, or which have affirmatively been designated by the government as available for First Amendment expression, are the only types of locales which can be deemed public fora. Indeed, such a dogmatic approach to public forum analysis would excessively "focus[ ] on tradition rather than reality. The right to freedom of speech cannot exist in the

abstract. It necessarily presupposes the right to communicate. In the absence of an effective and meaningful opportunity to reach the relevant audience, the theoretical right of expression would be hollow." Stone, *Fora Americana: Speech in Public Places*, 1974 Sup. Ct. Rev. 233, 245.

Perry, therefore, simply identified two types of sites whose public forum status is certain and then indicated that for sites not falling within these two categories, the Court must conduct a case-by-case inquiry into the nature and function of the place to determine whether it can be characterized as a public forum. *See* 460 U.S. at 47-48; *see also Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 804-06 (1985). Traditional or designated usage, therefore, is by no means the beginning and end of public forum analysis.[12]

For this reason, those areas found not to be public fora have, for the most part, been physical or metaphysical "places" that are constructed and used for very narrow purposes and are not open to the public. Included in this category are government workplaces and employee fund drives, *Cornelius*, 478 U.S. at 804-05; utility poles,

[12] Nor is it necessary that the site have public communication as its express *raison d'etre* in order to be considered a public forum. While such a purpose is certainly a relevant consideration, it is not a requirement. As the Court has recently made clear, even narrow residential streets which have never in fact been held open for public communication are unquestionably public fora because, regardless of their historical or actual usage, all public streets are deemed *a fortiori* to be held in trust for the use of the public. *Frisby v. Schultz*, 108 S.Ct. 2495, 2500 (1988).

Taxpayers for Vincent, 466 U.S. at 814; collective bargaining meetings, *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 280-82 (1984); interschool mail systems, *Perry*, 460 U.S. at 47; letterboxes, *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129-30 (1981); prisons, *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 134 (1977); interior paid advertising cards in buses, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974), and; the curtilage of jailhouses, *Adderley v. Florida*, 385 U.S. 39, 41 (1966).

Contrasting the nature of the place in *Adderley* with that in *Edwards v. South Carolina*, *supra*, Justice Black emphasized for the Court that "[t]raditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not." 385 U.S. at 41. The state was thus entitled to ban expressive activity "on that part of the jail grounds reserved for jail uses." *Id.* at 47. Because in this closed, secured physical context the state could take such action, it followed almost by definition that "people who want to propagandize protests or views [do not] have a constitutional right to do so whenever and however they please." *Id.* at 48.

On the other hand, "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." *Jamison*, 318 U.S. at 416. Although "whether the property has been 'generally opened to the public' . . . is not determinative" of whether the property should be available for "the use of the people for communicative purposes," it is at the very least "a factor to consider," *Grace*, 461 U.S. at 177, and, as

a practical matter, has proven to be of considerable weight.

There are, indeed, few examples in the Court's cases of government-owned places that are available at all times for the full use of the public but in which all expressive activity may nevertheless be prohibited. One is *Greer v. Spock*, 424 U.S. 828 (1976). In *Greer*, however, Army authorities had a "special interest" in regulating all activities "within the confines of the military reservation." *Id.* at 837. " '[T]he historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command," *id.* at 383 (quoting *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886, 893 (1961)), is simply not "analyzed in the same manner as governmental regulation of a traditional public forum." *United States v. Albertini*, 472 U.S. 675, 687 (1985). A military base is "the enclave of a system that stands apart from and outside of any of the rules that govern ordinary civilian life on our country." *Greer*, 424 U.S. at 843 (Powell, J., concurring). The peculiar exigencies of the military constitute an overriding governmental interest that requires judicial deference to the commander's decision to restrict speech within the base. *See also, e.g., Goldman v. Weinberger*, 475 U.S. 503 (1986) (free exercise of religion); *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) (equal protection). Certainly, no comparable factors are present here, and when all the attributes of contemporary postal sidewalks are considered, there can be no doubt that they add up to public forum status.

II.

THE SOLICITATION OF DONATIONS IS A FULLY PROTECTED FORM OF FIRST AMENDMENT EXPRESSION WHICH MAY NOT BE PROHIBITED ON POSTAL SIDEWALKS.

It having been shown that the exterior, public access sidewalks of community post offices are a public forum, it follows that the solicitation of contributions for a political cause is a fully protected form of First Amendment expression which may not be banned from such places. Indeed, this Court has repeatedly held that, "charitable appeals for funds, on the street or door to door, include a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). In reaching this conclusion, the Court has recognized "that without solicitation, the flow of such advocacy would likely cease." *Id.* Since *Schaumburg*, the Court has repeatedly emphasized that the solicitation of funds is fully protected by the First Amendment. *See, e.g., Riley v. National Federation of the Blind*, 108 S.Ct. 2667, 2673 (1988) ("Our prior cases teach that the solicitation of charitable contributions is protected speech."); *Cornelius*, 473 U.S. at 797 ("Charitable solicitations of funds has been recognized by this Court as a form of protected speech.").[13]

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[13] *Cf. Buckley v. Valeo*, 424 U.S. 1, 16 (1976) ("Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily,

(Continued on following page)

The solicitation of contributions, therefore, may not be prohibited on the public sidewalks adjacent to the Bowie post office. Indeed, "[i]n such places, the government's ability to permissibly restrict expressive conduct is very limited . . . [R]estrictions such as an absolute prohibition *on a particular type of expression* will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *Grace*, 461 U.S. at 177 (emphasis added).

Here, there is no evidence in the record to indicate that Respondents' activities pertaining to the solicitation of funds interfered with or impeded postal operations in any way, or were otherwise "incompatible with the normal activity [of the post office] at a particular time." *Grayned v. City of Rockford*, 408 U.S. at 116-17. Consequently, the government regulation prohibiting all solicitation on post office sidewalks must be held unconstitutional.

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and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to reduce the exacting scrutiny required by the First Amendment.").

CONCLUSION

Therefore, and for all the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

DAVID M. LIBERMAN
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 277-9288

Attorney for Amicus Curiae International Society for Krishna Consciousness of California, Inc.